Supreme Court, U.S.
FILED
APR 24 1992
OFFICE OF THE CLERK

No. 91-1371

In the Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL JOHN CANINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in declining to instruct the jury that it must unanimously agree on which particular violations of law constitute the "series of violations" required for a continuing criminal enterprise (CCE) conviction.

2. Whether the district court erred in sentencing petitioner to a term of imprisonment on the CCE conviction and to a concurrent term of imprisonment on a related drug conspiracy conviction.

3. Whether the trial court erred in instructing the jury that it could consider evidence that was not specifically identified in the indictment in determining whether petitioner committed a "series of violations" for purposes of the CCE offense.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-43, is reported at 949 F.2d 928.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1991. A petition for rehearing was denied on January 14, 1992. Pet. App. 46-47. The petition for a writ of certiorari was filed on February 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Illinois, petitioner was convicted of conspiring to traffic in marijuana, in violation of 21 U.S.C. 846, and engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848. He was sentenced to concurrent terms of 26 years' imprisonment. The court of appeals affirmed. Pet. App. 1-43.

1. Petitioner and three co-defendants were convicted on the basis of evidence showing that they participated in a marijuana importation and distribution ring that imported more than 600,000 pounds of marijuana into the United States during a ten-year period. With the assistance of others, petitioner obtained truckload quantities of marijuana from the importing operation, stored it in a stash house near Allentown, Pennsylvania, and distributed it throughout the United States. Specifically, the evidence showed that:

(a) in 1982, petitioner and others stored for distribution 36,000 pounds of marijuana imported through Bridgeport, Connecticut;

(b) in 1983, petitioner and others stored for distribution 36,000 pounds of marijuana from a larger load imported through New York City, New York;

(c) in 1984, petitioner and others stored for distribution 27,000 pounds of marijuana from a larger load imported through San Francisco, California;

(d) in 1985, petitioner and others stored 18,000 pounds of marijuana from a larger load imported through New Orleans, Louisiana; and

(e) in 1986, petitioner and others obtained marijuana from a load imported through San Francisco, California.

In addition to the evidence of those five violations, the government presented evidence that in 1984, petitioner organized a shipment of 20,000 pounds of marijuana from Jamaica—the so-called "Jamaica Load"—and that petitioner was subsequently arrested and convicted based on that transaction. Pet. App. 4-6.

2. The court of appeals rejected petitioner's challenges to his conviction. It concluded that the district court was not obligated to instruct the jurors that they must unanimously agree on which particular violations of law constitute the "series of violations" required for a CCE conviction. See 21 U.S.C. 848(c). Pet. App. 29-35. The court of appeals additionally concluded that petitioner could be sentenced to concurrent terms of imprisonment for the CCE and conspiracy offenses. *Id.* at 35-36. It also ruled that the jury was entitled to consider the "Jamaica Load" evidence as one of those "violations," even though it was not specifically designated as a predicate offense in the indictment. *Id.* at 25-27. The court of appeals rejected a number of other arguments presented by petitioner and his co-defendants. See *id.* at 8-25, 27-29, 36-43.

ARGUMENT

1. Petitioner contends (Pet. 1-6) that the district court erred by allowing the jury to convict him of the CCE offense based on a unanimous finding that petitioner committed a drug offense that was "a part of a continuing series of violations." 21 U.S.C. 848(c). He contends that the court should have instructed the jurors that they must unanimously agree on which particular violations of law constituted the "series of

violations" required to establish a CCE offense. That contention is without merit.

The CCE statute imposes criminal penalties for engaging in a "continuing criminal enterprise," 21 U.S.C. 848. It further states that a person is engaged in a continuing criminal enterprise if: (1) he violates a provision of subchapter I or II of chapter 13 of Title 21 (dealing with control, enforcement, import and export of drugs); and (2) "such violation is a part of a continuing series of violations" of those subchapters, in which the person organizes, manages, or supervises five or more other participants and the person obtains substantial income. 21 U.S.C. 848(c). Thus, the CCE statute requires the jury to find that the defendant's violation has a certain characteristic, *i.e.*, that it is "a part of a continuing series of violations." But the statute does not require unanimous agreement as to the specific identity of the other violations that make up that series. The jury's unanimous agreement that the subject violation is "a part of a continuing series of violations" is sufficient to satisfy that element of the offense.[1]

That conclusion is consistent with settled law concerning jury unanimity and sufficiency of the evidence. This Court has consistently recognized that an indictment need not specify what means, among several named, was the method by which the crime was committed and that a jury need not agree upon a single means of

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[1] The courts of appeals have generally concluded that a "series of violations" means three or more violations. See *United States* v. *Hall*, 843 F.2d 408, 411 (10th Cir. 1988); *United States* v. *Ordonez*, 737 F.2d 793, 806 (9th Cir. 1984). The Seventh Circuit holds that only two violations, excluding conspiracy and other inchoate offenses, are sufficient. *United States* v. *Baker*, 905 F.2d 1100, 1102-1104, certs. denied, 111 S. Ct. 206, 270, 686 (1990). The jury instruction here required three violations; hence that disagreement is not relevant in this case.

commission. See *Griffin* v. *United States*, 112 S. Ct. 466, 469-470 (1991); *Schad* v. *Arizona*, 111 S. Ct. 2491, 2496-2497 (1991) (plurality opinion). As was noted in the *Schad* case last Term,

> In these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree on the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict."

111 S. Ct. at 2497 (plurality opinion) (quoting *McKoy* v. *North Carolina*, 494 U.S. 433, 449 (1990); accord 111 S. Ct. at 2506 (Scalia, J., concurring). In the case of CCE prosecutions, it is sufficient that the jury unanimously agree that the defendant committed a drug offense and that the offense was "a part of a continuing series of violations." The jury need not unanimously agree on which particular violations constituted that series.

Petitioner argues that the court of appeals' decision in this case conflicts with the Third Circuit's decision in *United States* v. *Echeverri*, 854 F.2d 638 (1988), which held that a district court committed reversible error by failing to instruct a jury that it must unanimously agree on the constituents of the "continuing series of violations."[2] This Court's decision in *Schad*, however, has

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[2] The Third Circuit did not make entirely clear whether such an instruction is required in every CCE case or only in unusually complex CCE cases. The court emphasized that the indictment in the case before it did not specify the violations that constituted the continuing series and offered no aid in focusing the jury's attention on the predicate acts. It also noted that the district court gave a specific unanimity instruction on predicate acts pertaining to a racketeering count, which, when coupled with the absence of a specific unanimity instruction on the CCE count, might have confused the jury. 854 F.2d at 643.

rejected *Echeverri*'s rationale. As both petitioner and the Seventh Circuit recognize (Pet. 3; Pet. App. 31 n.6), the *Echeverri* decision relied on the theory of juror unanimity that the Fifth Circuit employed in *United States* v. *Gipson*, 553 F.2d 453 (1977). See 854 F.2d at 643.[3] The *Schad* decision, however, specifically disapproved of the *Gipson* analysis, stating that its focus on juror unanimity did not answer the question whether the alternative findings permitted by the statute were merely different means of committing the same crime or separate and distinct offenses. See 111 S. Ct. at 2498 & n.5. Thus, *Schad* has undermined *Echevarri's* foundation, and when the issue arises again, the Third Circuit is unlikely to adhere to that decision.[4]

2. Petitioner also argues (Pet. 7-11) that the district court erred in imposing concurrent sentences based on the jury's verdict that petitioner had committed both a CCE and a drug conspiracy offense. Petitioner contends that "punishment for both CCE and conspiracy is barred by the Fifth Amendment." Pet. 10, citing *Jeffers* v. *United States*, 432 U.S. 137, 155-156 (1977) (plurality opinion). As the court of appeals correctly recognized, a district court may nevertheless sentence a defendant who is

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[3] The Third Circuit also cited *United States* v. *Beros*, 833 F.2d 455 (3d Cir. 1987), which also relied on *Gipson*. See Pet. App. 31 n.6.

[4] Significantly, the Third Circuit held, in another case predating *Schad*, that a specific unanimity instruction was *not* required with respect to a different aspect of the CCE offense—the identities of the five or more underlings necessary to sustain a CCE charge. *United States* v. *Jackson*, 879 F.2d 85 (1989). As the Seventh Circuit noted (Pet. App. 31-32), the Third Circuit's rulings in *Echeverri* and *Jackson* are difficult to reconcile. In the face of this Court's decision in *Schad*, the Third Circuit can be expected to reconcile that intra-circuit conflict by rejecting *Echeverri*. Cf. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

found guilty of both a CCE and a drug conspiracy offense to the appropriate prison term under the CCE statute and to an equal or lesser concurrent prison term under the conspiracy statute. Pet. App. 36. The district court's imposition of concurrent 26-year prison terms in this case did not result in "cumulative" punishment and was therefore permissible. See *Jeffers*, 432 U.S. at 154-155 & n.24.

Under the reasoning of this Court's plurality opinion in *Jeffers*, the CCE offense set forth in Section 848 encompasses a congruent Section 846 conspiracy, and Section 848 therefore establishes the maximum prison term that may be imposed based on the jury's finding that particular conduct violated both statutes. See 432 U.S. at 154-158. See also *Garrett* v. *United States*, 471 U.S. 773, 794-795 (1985). Section 848(a) specifies a maximum term of incarceration of life imprisonment. The district court implemented the *Jeffers* holding by imposing a term of 26 years' imprisonment for the Section 848 violation and a concurrent term of 26 years' imprisonment for the Section 846 violation.

As petitioner notes (Pet. 7-8), some courts have enforced the *Jeffers* holding by sentencing the defendant pursuant to Section 848 and "merging" or "vacating" the Section 846 conviction. See, *e.g.*, *United States* v. *Aiello*, 771 F.2d 621, 632-633 (2d Cir. 1985).[5] The *Jeffers* decision—which addressed cumulative fines—does not, however, require that result. See 432 U.S. at 155 n.24

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[5] See also *United States* v. *Rivera*, 900 F.2d 1462, 1478 (10th Cir. 1990); *United States* v. *Butler*, 885 F.2d 195, 201-202 (4th Cir. 1989); *United States* v. *Maull*, 806 F.2d 1340, 1346-1347 (8th Cir. 1986), cert. denied, 480 U.S. 907 (1987); *United States* v. *Cruz*, 805 F.2d 1464, 1479 (11th Cir. 1986), cert. denied, 481 U.S. 1006 (1987); *United States* v. *Schuster*, 769 F.2d 337, 344-345 (6th Cir. 1985), cert. denied, 475 U.S. 1021 (1986); *United States* v. *Smith*, 703 F.2d 627, 628 (D.C. Cir. 1983).

(finding no need to examine the sentences because, under Section 848, "petitioner is not eligible for parole at any time"). The Seventh Circuit has found that it is more efficient to enforce the *Jeffers* holding through concurrent sentencing, because in the event that a collateral attack affects the validity of a CCE aspect of the conviction, "the sentence under § 846 lawfully could become the basis of punishment." *United States* v. *Bond*, 847 F.2d 1233, 1238 (7th Cir. 1988). "That would happen automatically if the § 846 sentences remain in force, served concurrently with the CCE sentence," but it "would require extra motion if the § 846 sentences had to be vacated now and resurrected at some future time." *Id.* at 1238-1239.[6]

The Seventh Circuit's use of concurrent sentencing to enforce the *Jeffers* rule has essentially the same effect as vacating the Section 846 conviction, because even when the Section 846 conviction is vacated, a defendant who succeeds in collaterally attacking his Section 848 conviction remains subject to punishment based on a jury's finding of guilt under Section 846. See *Aiello*, 771 F.2d at 632-635. There is no reason for this Court to require the lower courts to adopt a uniform mechanism for preserving the Section 846 conviction, when the different approaches lead to essentially the same end result. The significance of the issue is further diminished by the fact that this is a pre-Sentencing Guidelines case. In future cases, CCE sentences will be subject to the Sentencing Guidelines' "multiple counts" provisions,

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[6] The Seventh Circuit has explained, 847 F.2d at 1239, that its use of concurrent sentencing in this context is consistent with *Ball* v. *United States*, 470 U.S. 856 (1985), because the offenses are not identical and the concurrent sentence does not have collateral consequences. Petitioner does not contend that *Ball* is relevant here.

which provide for grouping of related offenses. See Guidelines §§ 3D1.1 *et seq.*[7]

3. Finally, petitioner contends (Pet. 11-15) that the district court erred by instructing the jury that it could consider the evidence concerning the "Jamaica Load" in determining whether petitioner engaged in a "continuing series of violations" for purposes of 21 U.S.C. 848. Petitioner mistakenly asserts that this evidence could not be used because it was not identified in the indictment.

The Fifth Amendment requires that the government prove at trial the same offense that it has charged in the indictment. *United States* v. *Miller*, 471 U.S. 130 (1985). The indictment in this case specifically charged a violation of 21 U.S.C. 848. An indictment charging a Section 848 offense need not specify the particular acts that constitute the "continuing series of violations" element of that offense.[8] Thus, the government's use of the "Jamaica Load" evidence did not result in a variance from the indictment. See *United States* v. *Kramer*, 955 F.2d 479, 488 (7th Cir. 1992) ("[i]f the government was not

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[7] The decision not to vacate the Section 846 count in this case resulted in the imposition of an additional $50 special assessment under 18 U.S.C. 3013. See Pet. App. 35 n.8. The imposition of that assessment (which petitioner does not specifically mention or challenge) does not violate the principle of *Jeffers*. As the court of appeals recognized (Pet. App. 36), the additional $50 assessment does not exceed the maximum fine that could be imposed on the Section 848 count. See *Bond*, 847 F.2d at 1239-1240.

[8] See, *e.g.*, *United States* v. *Alvarez-Moreno*, 874 F.2d 1402, 1408 (11th Cir. 1989), cert. denied, 494 U.S. 1032 (1990); *United States* v. *Echeverri*, 854 F.2d at 642 n.4; *United States* v. *Becton*, 751 F.2d 250, 256 (8th Cir. 1984), cert. denied, 472 U.S. 1018 (1985); *United States* v. *Sterling*, 742 F.2d 521, 526 (9th Cir. 1984), cert. denied, 471 U.S. 1099 (1985).

required to allege any of the possible predicate acts in the indictment, there can be no error where it alleged all but a few of the acts").[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1992

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[9] As the court of appeals observed (Pet. App. 27), petitioner was on notice that the government would seek to use the "Jamaica Load" evidence against him. In fact, the parties spent an appreciable amount of time debating the proper use of that evidence. Thus, petitioner was not unfairly prejudiced by the government's action.